IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1666 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEVENDRABHAI BAPUDBHAI GHODIYAPATEL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MS REKHA H KAPADIA for Appellant(s) : 1,
MR RC KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 14/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The present appellant-original accused has been convicted and sentenced to RI for life and fine of Rs.5000/-, in default, 6 months SI for the offence punishable under Sec.302 of IPC, by the learned Addl. Sessions Judge and Fast Track Court No.3, Valsad, vide judgment and order dated 28-2-2005. However, he has been acquitted for the offence punishable under Sec.307 of IPC.

2. Being aggrieved and dissatisfied, the appellant has filed appeal through jail authorities. As there was a delay in filing the appeal, he has filed application for condonation of delay. The appeal has been numbered as Criminal Appeal No.1666 of 2005 by the office and handed over to learned counsel, Ms.R.H.Kapadia, to appear on behalf of the appellant.

3. The Court condoned the delay and the appeal was ordered to be placed on board for admission in due course. When the appeal has come up on board for admission, record and

proceedings were called for and learned counsel for the appellant has argued the matter at length on the basis of record and proceedings available with her and also on the basis of original record and proceedings of the Court provided to her.

4. The case of the prosecution in short is that on 7-5-1992 at about 7.00 a.m., the victim Kamalaben, her brother-in-law, Devendra and her son Bhailo etc. were in the house. When injured Kamalaben was cleaning the house, the appellant-accused, who was just sitting near the fire place, abruptly took out one wooden log from the fire place and gave a blow with it on the head of Kamalaben. To save herself, she went towards Savitaben and Manjulaben but appellant-accused follower her along with 'Trikam' (an agricultural instrument made of iron) and hence, Savitaben tried to intervene to save Kamalaben. Meanwhile, minor son of injured Kamalaben who was eating millet came out from the house

and, therefore, leaving Kamalaben there, accused ran towards minor Bhailo aged about 7 years and gave two blows with 'Trikam' on the head of Bhailo as a result of that, he fell down. Thereafter, he threw 'Trikam' and took out an axe and gave axe blow on the head of Kamalaben. Meanwhile, other persons arrived there and, therefore, appellant ran away from the Mohalla. People gathered there took severely injured Bhailo to hospital in a mechanical vehicle while injured Kamalaben was taken to a nearby hospital in a bullock cart and ultimately as physical condition of Bhailo was found to be very serious, he was shifted to Mahavir Hospital, Surat, while Kamalaben was taken to Bhagvati Hospital, Udwada for treatment and on 8-5-1992 Bhailo succumbed to the injuries at Mahavair Hospital, Surat. Meanwhile, brother of Kamalaben lodged the complaint with Vapi Police Station against the present appellant and it has been registered as Vapi Police

Station I.C.R.No.68 of 1992 for the offences punishable under Sec.307 of IP Code and later on Sec.302 of IPC was also added. Meanwhile, Athwa Police made arrangements for inquest panchnama of the deceased and also for post mortem of Bhailo at Surat. On completion of the post mortem, dead body was brought to his native place. Simultaneously, Investigating Officer started investigation into the matter and prepared panchnama of scene of offence in presence of panchas. They recorded statements of various persons, collected the cloth wore by deceased Bhailo at the time of incident by drawing panchnama and kept the same as muddamal. Simultaneously, father of the deceased also produced one cloth and same was also taken into possession by way of panchnama. Earth where blood stain was found has also been taken as muddamal. They also recorded statements of various persons including eye witnesses Savitaben, Manjulaben and injured

Kamalaben, etc. Meanwhile, on 11-5-1992, the appellant-accused was arrested by drawing panchnama to that effect and at the instance of accused, muddamal weapon namely 'Trikam', axe were discovered. Arrangements were also made by the police to send the muddamal to FSL and on receipt of FSL and post mortem reports, same were kept in investigation file. Upon completion of investigation, charge sheet was submitted against the accused in the Court of learned Judicial Magistrate (First Class), Pardi.

5. Before proceeding with the matter, it is required to be noted that the incident in question is alleged to have taken place on 7-5-1992. But present appellant-original accused absconded from judicial custody and again he was re-arrested on 16-1-2001 and, therefore, though charge sheet was filed in time, as the case alleged against the accused was triable exclusively by the Court of Sessions, learned J.M.F.C., Pardi, committed

the case to the Court of Sessions on 24-1-2001 and same has been transferred to the Court of Fast Track Judge wherein charge was framed at Ex.4. The accused pleaded not guilty to the charge and prayed of trial and, therefore, he recorded the evidence of practically all witnesses and thereafter, it has been transferred to the Court of Fast Track Judge. He recorded the statements of few witnesses and after giving opportunity to the learned advocates appearing for the respective parties delivered the impugned judgment and order whereby the appellant-accused was convicted to suffer for life as aforesaid which gave rise to the present appeal.

6. To prove the case against the accused, the prosecution examined following witnesses:

1) Mohanjibhai Moraribhai Patel, P.W.No.1, Ex.8, the panch of panchnama of scene of offence.

2) Arvindbhai Babarbhai, P.W.No.2, Ex.10, maternal uncle of the deceased and the person who filed the complaint Ex.11.

3)Makbul Hussainbhai Bhikha, P.W.No.3, Ex.12.

4)Suleman Ahmad Fansavala, P.W.No.4, Ex.17.

P.Ws.Nos.3 and 4 are panchas of discovery panchnama Ex.13.

5)Dr.Mahmmad Iliyaz Ijad Mahmmad Shaikh, P.W.No.5, Ex.18, the doctor who performed post mortem on the dead body of deceased Bhailo.

6)Kamalaben Arvindbhai Bapatbhai, P.W.No.6, Ex.20, the injured eye witness, mother of deceased Bhailo.

7)Savitaben Arvindbhai, P.W.No.7, Ex.21.

8)Manjulaben Dhirubhai, P.W.No.8, Ex.22.

P.Ws.7 and 8 are witnesses of incident and neighbours staying in the same locality.

9)Bhukhubhai Bhimjibha Mer, P.W.9, Ex.25.

10)Dr.Bharatbhai Mohanlal Gandhi, P.W.10, Ex.44, the doctor who treated injured Kamalaben at Bhagavati Hospital, Udwada.

Prosecution also relied on various documentary evidence namely, panchnama of scene of offence Ex.9, complaint Ex.11, discovery panchnama of weapon at the instance of accused Ex.13, seizure of blanket Ex.14, cloth of the deceased Ex.15, inquest panchnama Ex.16, post mortem report Ex.19, forwarding letter written to FSL Ex.26, report received from FSL Ex.28, serological report Ex.29. On submission of closing purshis by the prosecution, learned Addl.

Sessions Judge, Fast Track Court No.3, Valsad, recorded the further statement of the accused under Sec.313 of the Code of Criminal Procedure. Thereafter, on hearing the learned advocates appearing for the respective parties, learned Addl. Sessions Judge, delivered the impugned judgment, whereby the appellant was convicted and sentenced to suffer for life.

7. We have heard learned counsel for the appellant, Ms.R.H.Kapadia and learned APP, Mr.Kodekar at length.

8. It is mainly argued by Ms.Kapadia that the person who lodged the complaint is not the person who has seen the incident and, therefore, no much weight should be given on the FIR. She has raised doubt about the discovery panchnama mainly on the ground that both the panchas have not supported the said panchnama. 'Trikam” has been seized from the appellant and, hence, according to her, it cannot be said to be a discovery panchnama drawn under Sec.27 of the Indian Evidence

Act. She has also taken us through post mortem note Ex.19 and evidence of Dr.Mahammad Iliyaz Ijad Mahmmad Shaikh, P.W.5, Ex.18. She has also taken us through the evidence of Kamalaben, P.W.6, Ex.20, Savitaben, P.W.7, Ex.21 and Manjulaben, P.W.8, Ex.22 and argued that Savitaben and Manjulaben are nearest relatives and neighbours who are having good relation with Kamalaben and hence, they are interested witnesses and therefore, their evidence should be discarded. If we discard the evidence of above referred three witnesses, then, there are no other evidence which connect the accused with the crime. She has also argued that father of the deceased, Arvindbhai and appellant-accused are step brothers and there were property dispute and, therefore, the appellant has been falsely involved into the crime in question. Lastly, it is argued that the appellant is a young man and the way in which the incident has taken place, it shows that it is a sudden provocation and, therefore, case would not

fall under Sec.302 IPC and hence, appellant should be shown some sympathy.

9. Learned APP, Mr.Kodekar, has vehemently argued after showing the above referred evidence at length along with the reasoned judgment that it is a case wherein the prosecution is able to prove the case beyond reasonable doubt. It is also argued that incident has been taken place in broad day light at 7.00 a.m. that too also in front of the house of eye witnesses and, therefore, their presence is quite natural. The appellant and the injured Kamalaben were staying together in a joint family and, therefore, question of falsely involving him into the crime is out of question. He has also taken us through the detailed internal and external marks of injuries described by the doctor in column Nos.17, 18 and 20 of post mortem report and argued that the first blow was given by the appellant with wooden log to Kamalaben and, thereafter, he took 'Trikam' in his hand and tried to kill

Kamalaben. Meanwhile, he saw the child aged about 8 years who was eating millet and hence, he went there and gave two 'Trikam' blows on him resulting into offence under Sec.302 IPC , and therefore, according to him, it cannot be said to be a case of sudden provocation. It has been further argued that no cause has been provided by the otherside and there are no cross examination or suggestion on that point to show that there were altercation between them resulting into the scuffle. He has also argued that the evidence of neighbours are natural as all are from the same community and are neighbours related to the injured as well as the appellant of the same decree and, therefore, it cannot be said that they have tried to help the prosecution just for the purpose of falsely involving the accused into the crime.

10. We have also given thoughtful consideration to the arguments advanced by the learned counsel for the respective parties.

11. It is also required to be noted that in this

incident, Kamalaben received head injury by wooden log and deceased Bhailo, the child aged about 8 years, received fatal injury with 'Trikam'(iron agricultural instrument) on head and which resulted into fracture, which reflects from column Nos.17 and 20 of post mortem note being external and internal marks of injuries respectively and also the cause of death given in the post mortem note.

12. It is to be noted that in order to prove the guilt against the present appellant-accused, the important witnesses are Kamalaben Arvindbhai Bapudbhai, P.W.No.6, Ex.20, who is the injured eye witness and mother of deceased Bhailo and who received blow with wooden log, Savitaben Arvindbhai, P.W.No.7, Ex.21 and Manjulaben Dhirubhai, P.W.No.8, Ex.22.

13. The afore referred three witnesses have categorically deposed that the incident happened at 7.00 a.m. when Kamalaben was working in front of her house. At that time, the appellant, who was sitting very near the

fire place took wooden log and gave blow with it on the head of Kamalaben. For the purpose of saving her, she went to Savitaben and Manjulaben and appellant followed her. As Savitaben tried to save Kamalaben, the accused ran towards minor aged 8 years who was eating millet and gave two blows on him with 'trikam'. Since he was not satisfied with that, he threw the 'trikam' and took an axe and went towards Kamalaben. Ultimately, as people gathered there, he could not fulfill his desire to kill Kamalaben and left the area. Similar is the version given by all the three witnesses. As established from the evidence on record, incident has been taken place at 7.00 a.m. and hence, presence of these three witnesses at the place of incident is quite natural. When these witnesses have been thoroughly cross examined by the learned counsel for the appellant who appeared into the court below, nothing contrary came out which shake their evidence except the suggestion that they are relatives

and neighbours.

14. We have also examined in that angle and we are fully satisfied about their presence being quite natural. They are relatives but relatives of both the injured and the deceased as well as of the appellant of the same degree and, therefore, it cannot be said that they have deposed for the purpose of falsely involving the appellant accused.

15. Reliance is placed on a decision of the Apex Court reported in **(2006)2 Supreme Court Cases (Cri) 353** in the case of State of A.P. Vs. S.Rayappa and Others wherein it has been held at head note `A' as under:

> "A. Criminal Trial—Witnesses—Related witness-Merely because witnesses were related to deceased, they cannot be said to be interested witnesses and on that ground alone their testimony cannot be rejected—In view of the reluctance of the general public to be a witness, a close relative is the only natural witness, and the only requirement is that testimony of such a witness should be examined cautiously by court-Words and phrases —"interested witness"".

In view of the aforesaid law laid down by the

Apex Court, the testimony of the witnesses related to the deceased cannot be rejected and it has to be examined cautiously.

16. On a careful examination of the evidence of injured Kamalaben, Savitaben and Manjulaben, we are of the opinion that though they are relatives of both the accused as well as of the injured and deceased, their testimonies being trustworthy evidence inspiring confidence cannot be discarded.

17. Apart from the above, the weapons used in the commission of offence has been identified by all the three witnesses. Even doctor also opined to that effect in his oral evidence at Ex.18 by specifically stating that the injuries received by Bhailo are blows caused by 'Trikam' as well as by the reverse side of axe. Doctor also opined that death of Bhailo was homicidal death. This is corroborated by the evidence of eye witnesses and, therefore, on the basis of evidence on record, we are of the opinion that death of Bhailo is homicidal death. Once it has been proved beyond

reasonable doubt, then comes the question connecting the appellant with the crime.

18. We have discussed above regarding the evidence of all the three eye witnesses along with the latest law laid down by the Apex Court and we have held that the involvement of the appellant accused in the crime in question has been fully established. As far as property dispute is concerned, except mere suggestion, there are no other evidence on record supporting the said suggestion.

19. We would have also considered the age of the appellant accused but he has been held guilty for the offence punishable under Sec.302 IPC and only minimum sentence has been awarded and hence, keeping in mind the seriousness of crime having committed by the accused of killing a minor child aged about 8 years, it is a case wherein no sympathy is required to be shown. Hence, we are unable to interfere with the judgment and order of conviction and sentence recorded by the court below. We are therefore of the opinion that the appeal of

the appellant is required to be dismissed.

20.Appeal is hereby dismissed.

[R.P.DHOLAKIA,J.]

[M.D.SHAH,J.]

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